U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: [redacted] Office: HONOLULU, HAWAII Date: DEC 19 2001

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(F)

IN BEHALF OF APPLICANT:

[redacted]

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Honolulu, Hawaii, denied the immigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) with the Service on October 5, 1999. The petitioner is a 50-year-old married citizen of the United States. The beneficiary is 11 years old at the present time and was born in Muang Satoon, Thailand on April 18, 1990. The record indicates that the petitioner and her spouse have not adopted the beneficiary.

The director denied the petition after determining that the beneficiary did not meet the statutory definition of orphan because she was not abandoned by both parents.

On appeal, the petitioner submits a brief. The petitioner asserts, in part, that the beneficiary is the child of a sole parent (biological father) who is unable to provide for the beneficiary's proper care, consistent with the local standards in Thailand.

Section 101(b)(1)(F) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(b)(1)(F), defines orphan in pertinent part as:

> a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption.

On December 7, 1999, the director issued to the petitioner a Notice of Intent to Deny the petition. The director stated that the beneficiary did not meet the definition of an orphan because she was not abandoned by both parents, as that term is defined in 8 C.F.R. 204.3(b). The director elaborated that the beneficiary was "under the care and control of her father" and the petitioner had not submitted evidence that the beneficiary had become a ward of a competent authority in accordance with the laws of Thailand.

In a December 27, 1999 response to the director's Notice of Intent to Deny, counsel stated that the petitioner had submitted sufficient evidence that the biological father was "the sole surviving parent, and that he was unable to provide proper care for the child." Counsel noted that the petitioner had previously submitted an order of the Central Juvenile Family Court of

Bangkok, which found that the biological mother had abandoned the beneficiary and, therefore, had permitted the biological father to legitimate the beneficiary with sole parental power. Counsel stated that "[t]here can be no other inference from this order other than that the child has only one parent and that is the father." Counsel further stated that the law of comity between nations required the Service to recognize foreign decrees and to hold them valid for immigration purposes.

The director denied the petition on January 28, 2000, for the reasons stated in the Notice of Intent to Deny. The director specified that evidence in the record indicated that the biological father sought to relinquish the beneficiary to a specific person (the petitioner), which was not permitted under the definition *of abandonment by both parents* at 8 C.F.R. 204.3(b). The director also found that the petitioner did not present evidence that the biological father was incapable of providing proper care to the beneficiary.

On appeal, counsel states the following:

> The District Director completely ignored the clear reading of Sections 101(b)(1)(D) and (F) of the Act. Section 101(b)(1)(D) of the Act, as amended by Section 315(a), Act of November 6, 1986, Pub. L. No. 99-603, 100 STAT.3559, 3439, gave the natural father of an illegitimate child equal rights with the natural mother.
>
> The definition of "sole parent" as shown in 8 C.F.R. § 204.3(b) is in conflict with this law and is therefore invalid, as it gives only the natural mother the right to be considered a sole parent as it relates to orphans. In an opinion memorandum dated March 25, 1987, from the office of the General Counsel to the Associate Commissioner, a proper legal stance concerning the February 5, 1987 revision of Section 101(b)(1)(D) was put forth by the General Counsel.
>
> In that memorandum he stated:
>
> > On the other hand, if the natural father has custody of the illegitimate child, and the mother were dead or had abandoned the child, the natural father could, after IRCA, qualify as the "sole parent" and release the child for adoption, thus rendering the child an eligible orphan.
>
> Furthermore, 8 C.F.R. § 204.3(b) conflicts with Section 101(b)(F) of the Act, which clearly states in part:
>
> > . . . or for whom the sole or surviving parent

> is incapable of providing the proper care and has in writing irrevocably released the child for immigration and adoption.

Counsel also reiterates his argument in rebuttal to the director's Notice of Intent to Deny, in which he stated that under the principle of comity, the Service should recognize the court order of Thailand regarding the beneficiary's legitimacy and the biological father's sole legal custody over the child.

Counsel's statement on appeal is not persuasive. Even though the record clearly indicates that the biological mother abandoned the beneficiary and that the biological father has sole legal custody over the beneficiary, the biological father does not meet the definition of *sole parent* as that term is defined in 8 C.F.R. 204.3(b).

It is important to emphasize that the Service does not dispute the validity of the judgement from Bangkok's Central Juvenile and Family Court ("Family Court"), which permitted the biological father to legitimate the beneficiary and to have sole parental power over the beneficiary. The Service also does not dispute that the beneficiary's biological mother abandoned the beneficiary shortly after birth. Accordingly, the Service does recognize the validity of the Family Court's ruling that the beneficiary was legitimated on April 20, 1999 by her biological father and that the biological father has sole parental control over the beneficiary.

The Service does, however, dispute counsel's argument that the biological father can be defined as a sole parent under immigration law, and that the definition of *sole parent* at 8 C.F.R. 204.3(b) is invalid because it is in conflict with the statute.

8 C.F.R. 204.3(b) states, in pertinent part:

> *Sole parent* means the mother when it is established that the child is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act. An illegitimate child shall be considered to have a sole parent if his or her father has severed all parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption. This definition is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all such children are considered to be legitimate. In all cases, a sole parent must be *incapable of providing proper care* as that term is defined in this section.

The definition of *sole parent* in the regulation stipulates that a sole parent can only be the mother when it is established that the child is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act. According to the record, the beneficiary acquired another parent on April 20, 1999 when the biological father legitimated the beneficiary pursuant to the laws of Thailand.[1] Accordingly, the biological father cannot be considered the beneficiary's sole parent because the beneficiary is not illegitimate. Furthermore, even if the beneficiary were illegitimate, the regulation clearly states that only a biological mother can be considered a sole parent. Therefore, the biological father cannot qualify as a sole parent under the regulatory definition.

Counsel states on appeal that the definition of *sole parent* found in 8 C.F.R. 204.3(b) is invalid because it is in conflict with sections 101(b)(1)(D) and (F) of the Act. Counsel's statement is noted; however, it is without merit.

Counsel cites a March 25, 1987 memorandum from the Office of General Counsel to support his argument that a biological father may be considered a sole parent. However, the guidance in that memorandum was later superceded by a November 18, 1987 memorandum from the Office of the General Counsel and, more importantly, by the codification of 8 C.F.R. 204.3 in August of 1994.

The definition of *sole parent* found at 8 C.F.R. 204.3(b) was codified after publication in the Federal Register on August 1, 1994 as a final rule. In the preamble to the final rule, the Service stated the following about one comment that it had received regarding the definition of *sole parent*[2]:

> One commenter indicated that the definition of "sole parent" might have an impact on the determination of whether certain children were orphans under the Act. This definition imposes no new requirements, and it is simply a codification of longstanding requirements which are contained in several related portions of the Act. Accordingly, this definition has not been changed in the final rule.

See. 59 Fed. Reg. 38881 (1994)

The Service's explanation for why it defined *sole parent* the way it did in the final regulation indicates that the definition was consistent with the related portions of the Act. Additionally, in

[1] As previously stated, the Service recognizes the validity of the Family Court's ruling.

[2] The Service received this comment during the comment period that followed the publication of the proposed rule in the Federal Register on November 8, 1993.

a letter from James A. Puleo, INS Executive Associate Commissioner for Programs, to David L. Hobbs, Acting Assistant Secretary of State for Consular Affairs (Nov. 25, 1994), Mr. Puleo emphasized that the August 1, 1994 final rule "did not represent a change in the Service's long-held position that only the mother of an illegitimate child can be regarded as the 'sole parent' for purposes of (INA § 101(b)(1)(F))."[3]

Accordingly, counsel's argument that the regulation is in conflict with the Act is erroneous. As previously stated, the biological father cannot be considered a sole parent as that term is defined in 8 C.F.R. 204.3(b).

The record clearly establishes that the beneficiary has two parents; the biological father legitimated the beneficiary in April of 1999. Therefore, in order to be eligible for classification as an orphan, the petitioner must establish that the beneficiary has been abandoned by both parents.

8 C.F.R. 204.3(b) states, in pertinent part:

> *Abandonment by both parents* means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered to be abandoned.

[3] Mr. Puleo's letter was reported on and reproduced in 71 Interpreter Releases 1644, 1650 (Dec. 12, 1994).

The Family Court's order establishes that the biological mother abandoned the beneficiary and that she has willfully forsaken all parental rights, obligations, and claims to the beneficiary, as well as all control over and possession of the beneficiary, without intending to transfer, or without transferring, these rights to any specific person(s). The petitioner has not, however, established that the biological father has abandoned the beneficiary.

The record reflects that the beneficiary has been residing with her biological father since birth. The biological father has not willfully forsaken all parental rights, obligations, and claims to the beneficiary, as well as all control over and possession of the beneficiary, without intending to transfer, or without transferring, these rights to any specific person(s). In fact, the record indicates that the biological father has intended to transfer his parental rights to the petitioner through the contemplated adoption with the petitioner. Such a relinquishment of parental rights to a specific person is not considered to be abandonment under U.S. immigration laws.

Accordingly, the petitioner has failed to show that the beneficiary has a sole parent, as that term is defined in the regulation, or that the beneficiary has been abandoned by both parents. Therefore, the director's decision to deny the petition is affirmed.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.